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No. 87-444

In the

Supreme Court of the United States

October Term, 1987

RICHARD L. SMEGAL, MARVIN A. ROGERS, and RODNEY W. BOMSTAD, on behalf of themselves and all others similarly situated,

Petitioners,

v.

GATEWAY FOODS OF MINNEAPOLIS, INC., and OVER-THE-ROAD, CITY TRANSFER, COLD STORAGE, GROCERY & MARKET DRIVERS, HELPERS & INSIDE EMPLOYEES UNION, LOCAL NO. 544, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, NATIONAL SUPER MARKETS, INC.,

Respondents.

BRIEF OF RESPONDENT GATEWAY FOODS OF MINNEAPOLIS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The Respondent, Gateway Foods of Minneapolis, Inc., respectfully opposes the Petition of Petitioners Richard L. Smegal, Marvin A. Rogers and Rodney W. Bomstad for a Writ of Certiorari and herewith submits this Brief in opposition.

COUNTER-STATEMENT OF THE CASE

Respondent, Gateway Foods of Minneapolis, Inc. (Gateway), takes no exception to the Statement of the Case of Petitioners but believes that certain additional facts which appear of record should be presented for consideration.

Those former employees of National who were hired by Gateway were required to fill out employment applications with Gateway and to submit to the Gateway pre-employment physical examination. (Bomstad Dep. at p. 32, Stip. Exh. H, para. 2) Some of the National Employees failed the Gateway physical and were rejected for employment. Gateway relented after the union filed a grievance over this issue and hired those employees. (Bomstad Dep. at p. 35)

The nature of the Gateway operation following the transaction was significantly different from the National operation prior to the transaction. Thus, both before and after the transaction, Gateway was a large scale food wholesaler engaged in the sale and distribution of groceries and related products to retail outlets at large and did not own such outlets of its own. National was a completely integrated retail grocery business with a subsidiary storage and distribution operation. Following the transaction, National remained in the retail grocery business, but relied upon Gateway and others for its supplies. (Stip. paras. 2 and 3, Exh. P)

Prior to the transaction between Gateway and National, the affected employees of Gateway and National respectively were separate appropriate bargaining units for purposes of the National Labor Relations Act. Following the transaction, the combined work forces of Gateway and National were a single appropriate bargaining unit and the former employees of National separately would not constitute a separate appropriate bargaining unit for purposes of the National Labor Relations Act.

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SUMMARY OF ARGUMENT

I. The District and Circuit Courts Correctly Interpreted and Applied Existing Case Law to the Facts Before Them.

In approaching the successorship question both the District Court and the Circuit Court of Appeals recognized that the issues in a successorship are to be resolved on a "case by case" basis. At both levels the Court proceeded to review the facts of record, and determined that on the basis of all facts presented, there was not sufficient continuity to find successorship. Thus, neither Court applied a "fixed rule" but simply weighed all factors before it. It is true that continuity of employment is a significant factor and in both the District Court and Circuit Court opinions the issue was disposed of adversely to Petitioners. The District Court, however, then proceeded to examine all other factors relevant to continuity and found that the consolidation of functions and change in the nature of the overall business militated against a finding of successorship. The Court noted that the similarity of machinery equipment and production methods was not of such magnitude to be controlling.

The analysis by the Circuit Court was to the same effect. Thus the Court states

> Even if the Appellants' definition of the majority test were accepted by the panel, the remaining factors used to evaluate substantial continuity support the District Court's decision. (A-7)

The Court went on to examine the seven factors bearing on successorship and found that there was insufficient factual continuity to find successorship.

Thus, at both levels below, there has been an analysis of all facts resulting in the same conclusion that there is insufficient continuity to establish successorship. Gateway respectfully sub-

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mits that there is no need for any further analysis of this same question.

As this Court has emphasized, there is "no single definition of successor" and that cases of this nature are to be handled on a "case by case" basis. *Howard Johnson Co. v. Detroit Local Joint Executive Board,* 417 U.S. 249, 256 (1974). This is precisely the approach utilized by the Courts below.

It is true as Petitioners point out that one of the continuities significant in the analysis of the successorship issue is the question of continuity of employment. It is also true as Petitioners point out that there has been some confusion as to whether that continuity is to be measured according to whether the purchaser acquires a majority of the seller's workforce or whether the seller's workforce constitutes a majority of the purchaser's work force. The confusion may be traced to a reference by this Court in *Howard Johnson Co. v. Detroit Local Joint Executive Board, supra,* to the facts in the case before it that the alleged successor did not acquire a majority of the predecessor's employees. Subsequently, this Court in *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272 (1972) made clear that for purposes of the refusal to bargain context, the question of continuity was to be measured upon whether the predecessor's employees constituted a majority of the successor's workforce. Later Circuit Court opinions have rejected a contention that this Court in *Howard Johnson* intended to pronounce a specific rule. Thus, in *Saks and Company v. NLRB,* 634 F.2d 682 (1980), the Second Circuit referenced the *Howard Johnson* decision on this point stating:

> This language does not conclusively establish which majority was intended nor do the sources cited in the supporting footnote which include at least one case and one law review comment clearly rejecting the majority of the predecessor bargaining unit test.

Id. at fn. 3. Likewise, in *Boeing Company v. International Association of Machinists,* 504 F.2d 307 (1974), the Fifth

Circuit stated with regard to this issue: "As we have already expressed, we do not find that the Supreme Court has established any benchmark." 504 F.2d at 320. Although the Court there adopted the majority of the predecessor's bargaining unit as the test, it went on to state in footnote 19:

> Our conclusion as to which ratio is more significant in determining whether a successor is obligated to arbitrate does not of course preclude all consideration of the other ratio. For example, an arbitrator may consider that the workforce of an absorbed enterprise has been diffused in such a way as to preclude the application.

It has been the contention of Gateway throughout this litigation that the correct test for successorship in all cases is whether a majority of the successor's employees are made up of predecessor employees. It has also been the position of Gateway that if this question is answered in the negative there may be no successorship. Had the Circuit Court so ruled herein, the issue would be presented in the context suggested by the Petitioners. However, the Circuit Court did not so rule. As noted above, both the District and Circuit Courts regarded the majority question as only one of the continuity factors to be considered. Both Courts decided that on the record as a whole and considering the matter on a case by case basis that successorship was not demonstrated. Wholly apart from the majority formulation issue, therefore, the case is in a posture of having applied previously enunciated standards which require no further explication. It can be seen therefore that Petitioners in attempting to present this case as a pure issue of the correct majority formulation are in reality only attempting to quarrel with the factual analyses made by the Circuit and District Courts. This is not a Supreme Court issue.

II. The Lack of a Breach by the Union of its Duty of Fair Representation is a Proper Consideration Herein.

In a separate concurring opinion, Circuit Judge Arnold expressed doubts about the correct manner of formulating the question of employment continuity and suggested that a conflict between the Circuits was being unnecessarily created. Significantly, Judge Arnold did not conclusively rule upon the question of which formulation was appropriate and did not dissent from the majority's determination that the other continuities applicable to successorship were not present. Judge Arnold did however conclude that the issue did not need to be resolved stating:

> Whatever the merits of the question of successorship, I am persuaded that it is **as a matter of law** close enough to justify the union's decision not to pursue a grievance based on a successorship theory. (A-8, emphasis supplied)

Petitioners refer to this opinion as "inexplicably ignoring the earlier decision in Smegal I." (Brief, p. 8) This is no doubt a reference to the fact that the Circuit Court of Appeals in a prior appeal had held that summary judgment in favor of the Defendants on the duty of fair representation issue was inappropriate because there was sufficient evidence upon which a jury could find that the union's refusal to process the successorship grievance was perfunctory and arbitrary. It is respectfully submitted that Judge Arnold's concurring opinion is not inconsistent with Smegal I and was a proper consideration. The Court in Smegal I clearly offered no opinion on whether there was a successorship and left that issue for futher proceedings. The Circuit Court did not hold or suggest that upon remand the case after trial must be permitted to go to the jury on the question of the duty of fair representation, but merely held that summary judgment was inappropriate. Clearly, after trial, a district judge would have had the power to determine whether the issue should or should not be allowed to go to

the jury. One factor in evaluating whether a union has breached its duty of fair representation is the closeness of the legal question upon which it was required to act. *Lewis v. Greyhound Lines-East,* 555 F.2d 1053 (D.C. Cir. 1977). Stated another way, a district judge after hearing the evidence on successorship could have concluded that the issue was sufficiently close as to resolve the duty of fair representation issue in favor of the union and require a directed verdict. Since the successorship issue was fully submitted on a fact stipulation, the Circuit Court could reach the same result. The emphasized portion of the above quotation shows that this was precisely Judge Arnold's reasoning.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully Submitted,

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